"Under the laws of Malaysia a similar distinction between dismissal and termination of services appears to exist and in their Lordships' opinion there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement.

In their Lordships' opinion Syed Othman J. was right to distinguish between dismissal and termination of services in accordance with the terms of the engagement; and right in holding that the respondent had not been dismissed but had had his services validly terminated."

We intimated to the appellant's counsel that we were of the view that he need not deal with grounds of appeal other than Ground 1. He has satisfied us as to the substance and merit of that ground and we do not propose to deal with or consider his other grounds.

We accordingly allow the appeal and set aside the judgment of the High Court at Kuching with costs here and in the court below.

Appeal allowed.

Solicitors: *Reddi & Co.; Batternberg & Talma.*

LEE PHEK CHOO v. ANG GUAN YAU & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) April 23, 1975]

[Kuching — Federal Court Civil Appeal No. 168 of 1974]

Trusts — Declaration of alleged trust — Alleged trust relating to land — No writing to indicate declaration of trust — Statute of Frauds — Applicable to Sarawak — Application of Laws Ordinance (Sarawak Cap. 2), s. 2.

One Teo Kim Tee (f) owned some landed properties and before her death she transferred the properties to the appellant, her daughter-in-law. The documents of transfer were duly registered. The respondents alleged that the deceased had intended that the properties were to be held on trust "to be divided amongst her grandchildren after her death." There was no writing to indicate any declaration of trust. The trial judge held that there was a trust of the properties. The appellant appealed.

Held, allowing the appeal: as the Statute of Frauds applied to Sarawak, and as there was no writing to manifest the declaration of trust, it could not be that a trust was created in respect of the properties.

Cases referred to:-

(1) *Knight* v. *Knight* (1840) 3 Beav. 148 at p. 173.

(2) *Chin Yuk Kon* v. *Chop Koong Onn* [1949] S.C.R. 19 at p. 20.

(3) *Grant* v. *Grant* 55 E.R. 770.

(4) *Wan Naimah* v. *Wan Mohamad Nawawai* [1974] 1 M.L.J. 41.

FEDERAL COURT.

Patrick Tan for the appellant.

S. Sahathevan for the respondent.

Lee Hun Hoe C.J. (Borneo): We allowed this appeal and stated we would give our reasons later. We do so now. There were some ten grounds of appeal.

The crucial issue in the appeal was whether there was a trust or not. In the light of the view we took on the issue we did not consider it necessary to go into other grounds. Before we go into the issue it would be necessary to outline some facts. Ang Leong Jut had established a business in Sarawak. He left for China together with his younger brother, Ang Kaw Chap and their mother, Lim Ee Tam (f). They stayed there for about a year. While there he married Teo Kim Tee (f). As he had no male issue at the time he bought first respondent/first plaintiff, previously known as Chong Beng, then aged about 8 years as a son in Hokkien Province, China. They returned to Sarawak in either 1913 or 1914 and lived at Main Bazaar. He had two children by Teo Kim Tee (f), namely, Mary Ang Jin Yeh (f) and Ang Guan Soon. Later, they moved to Padungan. At that time first respondent was about 10 years old. Ang Leong Jut died in Singapore and was buried there. The names of his children were engraved on his tombstone. First respondent was then about 14 years old.

There was no document in respect of the adoption of first respondent. Neither was there a ceremony of any kind or feast. The adoption was never registered. First respondent has three boys and two girls. Ang Guan Soon married appellant/defendant and they have one boy and two girls. Mary Ang Jin Yeh (f) has three boys and a girl.

Teo Kim Tee (f) was admitted to the hospital on October 3, 1961 and died on November 29, 1961. She owned a shophouse at Padungan where the family lived and also four pieces of rubber land. In 1961 deceased gave instructions to Lam Teng Kui (DW2) Chief Clerk of a legal firm to prepare the transfer of her properties. She gave him the titles and said that the properties were to be transferred to her daughter-in-law, the appellant. After the documents were ready, deceased was admitted to the hospital. So, Lam took the documents to the hospital and deceased signed them there on October 7, 1961. The consideration for the shophouse was $12,000 and the four pieces of rubber land $18,000. The documents were duly registered.

Sometime in 1964 appellant sold the Padungan shophouse for $47,000 and used part of the proceeds to buy a house at Central Road for $25,000. In December 1964, the family moved to the new house. First respondent alleged that it was then that he discovered that the properties were not in deceased's name and that the new house was registered in appellant's name. He then asked appellant and her husband about the matter and indicated his desire to see the document showing the distribution of properties to deceased's grandchildren. Except for allegations, there is no evidence of such a document or a will for that matter. Appellant told him that deceased had sold her the properties for $30,000. So, he consulted a lawyer in 1967. As a result, a letter dated October 9, 1967 was sent to appellant referring to the properties. Paragraph 5 of the letter reads:—

"The instructions from our client are that it was the wish of the deceased before her death that these lands should be equally divided between all the grandchildren of the deceased, but that desire, however, appears not to have been carried out by either your husband or yourself."

Through her lawyer, appellant wrote to first respondent a reply dated October 17, 1961 on the following terms:—

"Our client emphatically denies that your client is a son of the late Madam Teo Kim Tee, our client's mother-in-law. Nor was there any truth in your client's allegation as con-

tained in paragraph 5 of your letter. In fact prior to her death the said Madam Teo had transferred the said lands to our client for valuable consideration by memoranda of transfer property executed and registered in the Land Office."

By a writ dated December 7, 1968 respondents sued appellant alleging that no consideration was paid as it was orally agreed between deceased and appellant shortly before the execution of the transfers that appellant was to hold the lands on trust for deceased absolutely and that no beneficial interest in the lands should pass to appellant despite the transfers. They asked for account of the proceeds of sale of the shophouse and rents and profits arising out of the four pieces of rubber land. They prayed for declarations that the shophouse and the four pieces of rubber land were held on trust for them. Appellant denied all the allegations, particularly the agreement and trust. She challenged the *locus standi* of first respondent whom she claimed had no right to the properties at all.

Evidence purporting to amount to declaration of trust were given by second respondent, Ang Lui Choo (PW3) and Chang Ah Ngiun (PW4) an amah who was in the same ward in the hospital as deceased. Deceased was admitted to the hospital on October 3, 1961. The memoranda of transfers were executed four days later. The various conversations alleged to have taken place occurred after the transfers. Ang Poh Lim (PW2) said (at page 26 of Appeal Record) that in November 1961 he had conversation with deceased who mentioned that the properties were to go to the grandchildren but not to the two sons. Later, at page 29, he said:—

"More than a month after she was admitted she told me everything was arranged as regards the distribution of property. She spoke twice on this. The first time was when she was about to go home. The second time was on the following afternoon."

Ang Lui Choo (f) (PW3) at page 32 stated:—

"My grandmother told me these things a few days after she was admitted to the hospital. My grandmother told me this on two occasions and I was alone with her."

In reply to cross-examination at page 33 she said:—

"She said this one week after her admission to hospital."

She was asked about the second occasion. She answered:—

"When she was in the hospital more than a month. I know later that the transfer was made to defendant."

What Chang Ah Ngiun (PW4) knew was from conversations she had overheard.

In creating a trust, as laid down by Lord Langdale M.R. in *Knight* v. *Knight*[1] there must exist the three certainties, that is, certainty of words, certainty of subject-matter and certainty of objects. *Snell's* Principles of Equity, 26th Edition, discusses about the effect of absence of any of the certainties at pages 126 to 127 as follows: —

"The paramount certainty is that of subject-matter in the first sense; if there is no certainty as to the property to be held upon trust, the entire transaction is nugatory. Next, if that certainty is present but there is no certainty of words, the person entitled to the trust property holds free from any trust. Finally, if both these certainties are present but there is uncertainty of objects, there is a resulting trust for the settlor, for 'once establish that a trust (of definite property) was intended and the legatee cannot take beneficially', the same applies where there is uncertainty of the subject matter as regards the beneficial interest, unless one of the beneficiaries can establish a claim to the whole."

Halsbury's Laws of England, 3rd Edition, Vol. 38 at page 830 paragraph 1388 states that: —

"A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare the trust or by his will."

This is based on the Statute of Frauds which is a statute of general application and is applicable in Sarawak by virtue of section 2 of the Application of Laws Ordinance (Cap. 2) which reads as follows:—

"2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in Sarawak, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in Sarawak:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary."

That this is the position is indicated in *Chin Yuk Kon* v. *Chop Koong Onn*[2] by Lascelles J. when he said: —

"This is an alleged contract of guarantee and the position is governed by the provisions of the Statute of Frauds.

....

I am satisfied that there is in the sphere of guarantee an accepted and general usage, uniform and universal in Sarawak among Chinese. I have come to the conclusion that I must recognise such custom to the extent that it enables me to hold the 'chopped' bill to constitute sufficient memorandum to satisfy the provisions of the Statute of Frauds."

In this case there is no writing at all to indicate any declaration of trust. The only documents are the memoranda of transfer, but they in no way indicate any such declaration. Counsel for respondents conceded that the Statute of Frauds applied to Sarawak. But, he submitted that a trust could be oral provided there was evidence to show existence of such trust and relied on *Grant* v. *Grant*.[3] He was able to persuade the learned judge to his view for at page 128 of his judgment the learned judge said: —

"The law is that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal. As was stated by Romily, M.R. in *Grant* v. *Grant* (55 E.R. 770), words declaring a trust need not be in writing."

Grant's case[3] is concerned with chattels which the widow of the testator claimed as gifts from her husband. The widow sought a declaration of her right to those articles. With respect, the learned judge failed to appreciate that in the case of land different principles applied. In respect of land the declaration of trust must be manifested by some writing in compliance with the Statute of Frauds if it is applicable as it is in Sarawak. It is true that in *Wan Naimah* v. *Wan Mohamad Nawawai*[4] in respect of land in Kelantan this court upheld the view of the learned judge that the appellant held the half-share in the land in trust for the respondent. Suffice to say that a trust in respect of land could be created in Kelantan by parole because the English Statute of Frauds does not apply there. The position in Sarawak is different as the English Statute of Frauds is applicable.

Once it is clear that the Statute of Frauds is applicable, there must be some writing to manifest a declaration of trust. Respondents said that the memoranda of transfers were such writings manifesting and proving the declarations of trust. On the other hand, appellant denied the memoranda made such declarations but claimed that the transfers to her of the properties for valuable consideration were absolute.

Further, not only the pleading but also the evidence adduced by respondents are rather conflicting and, therefore, confusing. By paragraph 4 of their statement of claim they pleaded that appellant "was to hold the shop premises and the suburban lands on trust for deceased absolutely...." Therefore, the proper person or persons to sue would be the personal representatives of deceased and the properties would have to be distributed, according to the Chinese custom as applicable in Sarawak. But, in their prayers respondents asked the court to declare that the properties were held in trust for them. In presenting their case the basis of their claims seems to be that the properties were to be held in trust for the grandchildren of the deceased. Whether the properties were to be in trust for deceased or the grandchildren, first respondent certainly would have no cause of action against appellant. In the first place he is not an administrator of deceased's estate and in the second place he is not a beneficiary and has no right to any share in the properties.

In this case we do not consider that a trust has been created in respect of the lands. Accordingly, we allowed the appeal with costs here and in the court below. Deposit to be returned to appellant.

Ong Hock Sim F.J.: I have had the advantage of reading the judgment in draft of my brother, the Chief Justice, Borneo. I am in agreement that this appeal be allowed with costs.

The facts have been sufficiently set out by the learned Chief Justice and were not seriously in dispute between the parties. The respondents' claim rested solely upon alleged verbal statements made by the deceased to her grandson Ang Poh Lim, the second respondent and his sister, Ang Lui Choo (PW3) and *overheard* by a so-called independent witness, Chang Ah Ngiun, (PW4) an amah at 83, Tabuan Road, occupying a bed next to the deceased. These statements, it is contended, expressed the intention of the deceased that the shop premises and the suburban lands purportedly transferred to her for a total stated consideration of $30,000 by memoranda of transfer dated October 7, 1961, were to be held "on trust for the deceased absolutely" as "orally agreed between the deceased and the defendant" (appellant) (which was denied) and "on trust" to be "divided amongst her grandchildren after her death."

The defence, as to be expected, denied the alleged agreement and trust, questioned the *locus standi* of the respondents (plaintiffs) and pleaded that the registration of the transfers constituted an effective bar to the introduction of parol evidence to vary the Memoranda of Transfer.

I am satisfied that first respondent has no *locus standi* — he was neither beneficiary nor administrator of the estate. If, as alleged, the trust was for all the grandchildren, they should have been made parties or their interests in the subject-matter of the alleged trusts provided for in the judgment pronounced. It is not on the pleadings that the respondents sought to avoid the Memoranda of Transfer on ground that, as no consideration in fact passed, thereby the appellant was constituted a trustee for the estate of the deceased and bound to distribute the same in accordance with the law. The Agreed Facts made two things clear:—

(a) Teo Kim Tee was of sound mind and capable of managing own affairs at the time of transfer.

(b) No duress, coercion or undue influence at transfer.

Despite (b) above, it is observed that the learned judge apparently took a different view when he said:—

"She had gained her mother-in-law's confidence and her conduct as the whole of the evidence seems to suggest appears to me to be part of a very deep-seated plan when she began to ingratiate herself into the good opinion of the deceased and it may be said her whole hearted trust, to such an extent to enable her to transfer the properties in her name with the trust stipulation."

With respect, I am of the view that Exhibit P2 is inadmissible. (Notes of Proceedings of Kuching District Court Criminal Case No. B/307/67, wherein one Peter Chan Kok Song (m) aged 26 years was charged with criminal trespass of premises No. 38, Central Garden, Kuching, belonging to Ang Guan Soon). It was not between the same parties. Consideration of that evidence was not called for, for as the trial judge himself said:—

"The burden of defeating her title by proving that she holds at all times the disputed properties in trust for the plaintiffs as beneficiaries to the estate lies clearly on the plaintiffs.... I pass now to the second and in my view more important aspect of this case.

The plaintiffs say that when the deceased executed the transfers of the properties in favour of the defendant, it was her intention and will that the properties were to be divided amongst all of her grandchildren."

What was the evidence adduced in support, remembering the burden of proof lies upon the plaintiffs? I shall quote the testimony of PW2 and PW3 as well as that of PW4 whose evidence "seemed to me to be truthful" and accepted.

Ang Poh Lim (PW2) the son of Guan Yau has this to say:—

"In November 1961, I had a conversation with my grandmother. *She told me* that the properties would be given to the grandchildren but not to the two sons."

Then later:—

"I told my auntie and uncle, 3 years have elapsed now we want to see the Will. *My grandmother told me there is a Will.*"

And in cross-examination:—

"She told me orally. She did not say what property. She did not say which of the grandchildren. She merely said grandchildren."

Ang Lui Choo (PW3) often talked to the deceased. Her evidence of the conversation is as follows:—

"My grandmother told me the property has been finalised. The Trust Deed has been handed to Lee Phek Choo, the defendant, my aunt....

She said she had made a Will in the presence of defendant and her husband.

She had given a Trust Deed to defendant to distribute the property after her death amongst the grandchildren.

I have not seen the Will or the Trust Deed."

"Certain events in the hospital were narrated by a witness, an inmate in the hospital. This witness Chang Ah Ngiun (PW4) .... occupied adjacent beds with the deceased and is not in any way connected with the family.

Her evidence as to the substance of the conversation was:—

'I heard that the property was to be held in trust by the defendant. In the event of her death the property would be distributed to the grandchildren. *They spoke* in Hokkien. I understand Hokkien.'

She added she had seen the defendant as well as her husband in the hospital *and had overheard* a particular conversation between the deceased and the defendant, the substance of which is as follows:—

'She told the defendant in the event of her death she was to distribute the properties. Ang Jin Ang's son should be given a share because Ang Jin Ang was poor. She told the defendant don't try to deceive the grandchildren — Touch my heart.'

According to PW4....

'Certainly I will do it. I hope you will recover. God be with you.'

In cross-examination she said:—

'The grandmother and PW3 (the granddaughter) talked together this matter *many times* and she cried'."

What has PW3 to say of this:—

"My grandmother told me these things ... *on two occasions* and I was alone with her.

On one occasion defendant and her husband was there in the hospital. She said the Trust Deed was given to defendant. In event of her death defendant was asked to distribute the property according to the Trust Deed. If she recovers, she asked for return of the Trust Deed."

"Q. *The 2nd occasion* how long after the 1st?

A. When she was in the hospital more than a month." (The italics are mine).

With respect, after correctly deciding where the onus lay, the learned judge misdirected himself in respect of the following matters:—

(1) The validity of the adoption of respondent No. 1.

(2) The inadmissability of the evidence contradicting the consideration stated in the Memoranda and the observations of the magistrate in regard thereto in Ex. P2.

(3) The evidence in support of the trust was wholly hearsay and unreliable in the light of the failure to adduce any evidence as to the execution of the Will or Trust.

(4) No reason was given for rejection of, or reference made to, the evidence of Lam Teng Kui, Chief Clerk in Yong & Wong & Co. as to execution of the Memoranda and his further evidence that the deceased knew what she was doing and had not mentioned any trust or asked him to prepare a trust deed (or a will for that matter) when it was at her instructions that he prepared the Memoranda of Transfer, and

(5) Whether the plaintiff had *proved* the trust.

Expressions of intention are not enough. Equity will not perfect an imperfect trust. Is a trust established? Hearsay and oral evidence is all that was before the court. The Statute of Frauds applies to Sarawak (See *Chin Yuk Hon* v. *Chop Koong Oon*[2] *per* Lascelles J.).

As is said in *Halsbury's* Laws of England (3rd Edition), Vol. 38, Section 1388 at page 830: —

"A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare the trust or by his Will."

I accordingly am of the opinion that the respondents had failed to prove the existence of a trust and would dismiss the claim with costs here and in the court below. The deposit will be refunded to the appellant.

Suffian L.P. concurred.

Appeal allowed.

Solicitors: *Yong & Co.; Battenberg & Talma.*

CHEAH TEONG TAT v. HO GEE SENG & ORS.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F. JJ.) April 26, 1975]

[Penang — Federal Court Civil Appeal No. 133 of 1973]

Practice and Procedure — Appeal — Application for extension of time to serve notice of appeal — Special circumstances — Ignorance of procedural law not sufficient material for exercise of discretion — Subordinate Court Rules, 1950, Order XXXIX rule 2.

This was an appeal from the dismissal by Syed Agil Barakbah J. of the appellant's application for extension of time to serve a notice of appeal from a judgment entered against him in the Sessions Court ([1974] 1 M.L.J. 31). The judgment against the appellant in the Sessions Court was entered on May 6, 1972. He filed a notice of appeal in that court on May 11, 1972 but did not serve a copy of such notice on the respondents or their solicitors. The appellants subsequently applied for extension of time to serve the notice of appeal but this was dismissed in the High Court. On appeal,

Held (Wan Suleiman J. dissenting) dismissing the appeal: (1) sub-rules (1)(3) and (6) of Rule 2 of Order XXXIX of the Subordinate Court Rules, when read together, provide that an appeal from the decision of a subordinate court must be brought by way of a notice of appeal in Form 39 which must be filed in the court within 14 days from the day on which the decision was pronounced and served on all the parties affected by the appeal or their respective solicitors;

(2) the learned judge was right in finding that no case had been made out for the granting of extension of time to serve the notice of appeal on the respondents.

Cases referred to:-

(1) *Ahmad bin Yahya & Anor.* v. *Ahmad bin Sulaiman* [1972] 2 M.L.J. 109.

(2) *Chong Kuen Ying & Ors. v. Louis Lavagna* [1972] 1 M.L.J. 180.

(3) *Gatti* v. *Shoosmith* [1939] 1 Ch. 841; [1939] 3 All L.R. 916.

(4) *In re Coles and Ravenshear* [1907] 1 K.B. 1.

(5) *Krishnasamy & Ors.* v. *D.C. Batler-Madden* [1947] M.L.J. 182.

(6) *John Puddicombe Wilkins & Ors.* v. *John Patrick Kenlm Wilkins* [1951] M.L.J. 80.

(7) *Liew Chee Tat* v. *Loke Moon & Ors.* [1972] 2 M.L.J. 29.

(8) *New India Assurance Co. Ltd.* v. *Karam Singh* Muar Civil Appeal No. 1 of 1970.

(9) *Law Yee Wah & Anor.* v. *Poh Koh and Sons Realty Sdn. Bhd.* [1974] 2 M.L.J. 29.

(10) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 229.

FEDERAL COURT.

Lim Ewe Hock for the appellant.

A. Jayadeva for the respondents.